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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 333

MA-KING PRODUCTS COMPANY, APPELLANT

v.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE of the United States

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ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE APPELLEE

OPINIONS OF THE LOWER COURTS

The opinion of the District Court has not been officially reported. A brief informal opinion giving the reasons for dismissing the bill of complaint appears on pages 25–26 of the record. The opinion of the Circuit Court of Appeals is reported in 3 F. (2d) 936. It will also be found on pages 29–31 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered February 9, 1925. (R. 31.) This appeal was taken March 13, 1925. (R. 32.)

The cause was not one in which the judgment of the Circuit Court of Appeals was made final by Section 128 of the Judicial Code, as the suit was one to review the action of the Commissioner of Internal Revenue in refusing an application for a permit to operate a denaturing plant, and the jurisdiction of the District Court rested on Section 6, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 311), providing:

> In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof.

This Court has jurisdiction of the appeal under Section 241 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157), as it stood prior to the Act of February 13, 1925.

The evidence showed the value of the property proposed to be used under the permit for denaturing alcohol to be in excess of $35,000. (R. 6.)

As to the jurisdiction of the District Court, the bill of complaint did not state the amount in controversy.

It may be that Section 6, Title II, of the National Prohibition Act, above quoted, was intended to give the United States courts jurisdiction to review the action of the Commissioner in refusing a permit, in every case, without regard to the amount in controversy. It may not be necessary to decide that point, as the absence of an averment in the bill of complaint

respecting the amount in controversy did not deprive the District Court of jurisdiction, where the necessary amount was in fact involved and the evidence showed it. *Beard* v. *Federy*, 3 Wall. 478, 494.

STATEMENT OF THE CASE

The facts alleged in the bill of complaint and admitted in the answer are briefly as follows: The Ma-King Products Company, a corporation chartered under the laws of New Jersey to conduct a denaturing business and admitted in Pennsylvania for that purpose, by its president, Harry J. Bogash, applied on or about October 26, 1923, to the Collector of Internal Revenue at Pittsburgh, Pennsylvania, for a permit to operate a denaturing plant at 925 Bowen Street, in that city. The application was accompanied by the requisite bond, plans and sketches of the plant, certified copy of the minutes of the corporation showing the election of its officers and directors, and a certified copy of a resolution conferring upon Bogash the right to apply for the permit and to sign all necessary papers in connection therewith. Following a consideration of the application and an inspection of the plant and equipment, the Collector recommended to the Commissioner that the application be approved. The recommendation was not adopted, however, by the Commissioner, who upon further investigation disapproved the application. Charging that the denial of its application was arbitrary, illegal, and unreasonable and had resulted in great suffering and irreparable damage to it, the Ma-King Company filed its bill in equity in the

District Court, praying that the court review the action of the Commissioner, reverse his findings and direct that he approve the complainant's application and issue the permit prayed for, and that the court grant such other and further relief as it might deem meet. (R. 2–3.)

Answering the bill, the Commissioner admitted the main facts alleged therein, but denied that his action in refusing the permit was arbitrary or illegal, and averred (R. 4):

> That your respondent, as the result of an investigation conducted by respondent's agents, is informed that Harry J. Bogash and Joseph H. Klutsch, respectively, President and Secretary-Treasurer of the petitioning company, are not individually, or as officers of said petitioner, entitled to be entrusted with a permit of the nature and kind set forth in said Bill of Complaint, or any other permit under the provisions of the National Prohibition Act, and that, therefore, your respondent, upon said information, acted under full warrant of law and fact in disapproving the application of the petitioning company and declining and refusing to issue the permit prayed for by the petitioners.

The Commissioner further alleged that the petitioning company was not in any way prejudiced in its rights and that it had not in any way suffered any damage by reason of the acts of the respondent. (R. 3–4.)

The case was tried upon bill and answer before District Judges Thomson and Schoonmaker. After argument by counsel, Judge Thomson handed down the following brief opinion (R. 25–26):

> Judge Schoonmaker and I concur in the belief that there is nothing in this record which would justify the Court in finding that the Commissioner of Internal Revenue, in refusing the application of the plaintiff for a permit for the establishment of a denaturing plant, abused the wide discretion invested in him by the Act of Congress. We therefore feel that it is our duty, under this situation, to dismiss the bill of complaint, and an exception is granted to the plaintiff. A formal decree might be submitted, if it is necessary, which will be signed.

Following the entry of a formal decree dismissing the bill (R. 26), the complainant took an appeal to the Circuit Court of Appeals, where the decree was affirmed (R. 31). To review the latter decree, the Ma-King Company has brought the case to this Court on appeal.

QUESTIONS PRESENTED

1. Whether the Commissioner of Internal Revenue is vested with discretion in the matter of granting or denying an application for a permit under the National Prohibition Act.

2. Assuming that such discretion is vested in the Commissioner, what are its limitations?

STATUTES INVOLVED

The statutes which appear to have any bearing upon the questions involved in this case are set out in Appendix A to this brief. Particular attention is invited, however, to the fol'owing provisions of law:

A portion of Section 6, Title II, of the National Prohibition Act provides:

> * * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued *and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed* * * *.
>
> The commissioner *may prescribe the form of all permits and applications and the facts to be set forth therein.* Before any permit is granted the commissioner may require a bond *in such form and amount as he may prescribe to insure compliance with the terms of the permit* and the provisions of this title. In the event of the *refusal by the commissioner* of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (Italics ours.)

Section 10, Title III, declares that:

> Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, * * *.

Section 13, Title III, provides:

> The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products.

THE REGULATIONS

Such of the regulations issued by the Commissioner, in force when the permit was applied for (Regulations 61, Ed. July, 1920), as have any reference to the granting or denying of permits to operate denaturing plants are printed as Appendix B to this brief. These regulations prescribe where denaturing plants may be established, of what they shall consist, and with what they shall be equipped. They specify what the application for a permit shall show, on what form it shall be made (this form is set out as Appendix C), and what shall accompany it. They provide that upon receipt of a proper application the

Collector shall detail one of his deputies, or some other officer, who shall visit and inspect the plant and report whether he finds the statements of the application true and whether the plant is constructed in conformity with the law and regulations, and that the Collector shall thereupon indorse his approval or disapproval upon the several copies of the application and send the original to the Commissioner. They then state that "If the application is approved by the Commissioner of Internal Revenue, he will issue a permit on Form 1433," and provide what shall be done with the papers in such case or "in the event that the Commissioner disapproves the application." They further state that permits issued will remain in force until voluntarily surrendered or revoked by the Commissioner and declare that violation of any of the provisions of law or regulations relating to said plants or to the alcohol stored therein or denatured alcohol produced thereat, may, in the discretion of the Commissioner, work a revocation of the permit. Lastly, they specify the conditions upon which a permittee may obtain and denature alcohol free of tax.

The foregoing regulations contain nothing, however, to indicate the considerations, additional to compliance with the regulations, which may induce the Commissioner to grant a permit applied for. That he has such discretion is manifestly assumed all the way through the regulations. In the instant case no question as to the validity of the regulations is involved, as the allegation in paragraph 4 of the bill, that the regulations were duly complied

with by the applicant (R. 2), is admitted by the answer (R. 4). The sole questions involved, as above stated, are whether the Commissioner had sufficient discretion to investigate and determine the unfitness of the parties seeking the permit privilege and to deny a permit in such case; and if such discretion was possessed by him, whether he abused it.

SUMMARY OF ARGUMENT

A permit to operate a denaturing plant is a special privilege which the law generally prohibits. The Commissioner of Internal Revenue has authority to exercise broad discretion in the granting or refusing of such permits.

In view of the clear statutory responsibility resting upon the Commissioner of Internal Revenue and corresponding discretion in him, a court of equity will not upon review disturb his finding that the applicant is not a fit person to be entrusted with a permit, in the absence of a showing that such finding is an arbitrary exercise of power unsupported by any reasonable inference arising from the facts before him.

It appears from the evidence in the record that the Commissioner's action in refusing the application here involved was not arbitrary.

As the trial court before which the witnesses appeared was required to pass upon their veracity and credibility and their interest, or lack of interest, in the parties or in the subject matter, its decree, affirmed by the Circuit Court of Appeals, should not be overruled by this Court except for clear error.

ARGUMENT

I

The Commissioner is vested with a broad discretion in determing whether a permit shall be granted or denied

From an examination of the laws we find that the Commissioner has power—

(*a*) To specify the things authorized by a permit. (Section 1 (5), Title II.)

(*b*) To determine the amount of the bond to guarantee compliance with the terms of the permit. (Section 1 (6), Title II.)

(*c*) To make regulations governing issuance of permits. Section 1 (7), Title II.)

(*d*) In case of violation of Section 4, to order the manufacturer to desist from selling his article unless by a permit *issued upon such conditions as the Commissioner may deem necessary* to prevent illegal sales. (Section 4, Title II.)

(*e*) To demand a showing from persons manufacturing under Section 4 and to revoke their permits; but the permittee may thereupon by appropriate proceedings have the Commissioner's action reviewed in a court of equity and the court may modify, affirm, or reverse the *finding* of the Commissioner as the facts and law of the case may warrant. (Section 5, Title II.)

The Act has laid down the following rules relating to the Commissioner's power over—

(*a*) Persons:

No permit shall be issued to any person who within one year prior to the application

therefor shall have violated the terms of a permit or of any law, federal or state. (Section 6, Title II.)

Retail permits shall be issued only when the sale is to be made through a designated pharmacist. (Section 6, Title II.)

Only physicians shall be given the privilege to prescribe liquor. (Section 6, Title II.)

(*b*) Applications:

Must be verified.

Must set forth the qualifications of the applicant.

Must give the purpose for which the liquor is to be used. (Section 6, Title II.)

The Commissioner may prescribe the form of the application and define the amount of the bond to insure compliance with the terms of the permit. (Section 6, Title II.)

(*c*) The form:

The permit shall be in writing, dated when issued, signed by the Commissioner, and shall give the name and address of the permittee. (Section 6, Title II.)

(*d*) The substance:

It shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. (Section 6, Title II.)

The Commissioner is under the legal restrictions of procedure found in Section 9, Title II, in revoking a permit once granted. He must have the facts set forth on oath or he must have reason to believe that the permittee is not in good faith complying with the terms of the permit. Even then the Commissioner

may not summarily remove this valuable privilege. The law provides that he must issue an order citing the permittee to appear not sooner than 15 days nor longer than 30 days thence; that he must give the permittee a copy of the complaint or a summary of the reasons upon which the Commissioner has based his own judgment of the lack of good faith of the permittee. Furthermore, the Commissioner must grant the permittee a "hearing" on the issues thus raised. The hearing can not take place more than fifty miles from the place where the offense has been committed. After the hearing, however, the Commissioner is empowered to "revoke the permit" if he (a) "finds" the permittee has been guilty of "willfully violating" the law, or (b) finds that the permittee "has not in good faith conformed" to the provisions of the Prohibition Act. The permittee may have a review of the Commissioner's decision before a court of equity and "the court may affirm, modify, or reverse the finding of the Commissioner as the facts and law of the case may warrant."

Referring to the right of review thus conferred the court in *Ginsberg* v. *Yellowley* (E. D. N. Y.), 290 Fed. 262, observed (p. 263):

> The plaintiff appears to take the position that the power of the Commissioner was simply to adopt regulations, and that, if an application was made, which in form conformed to the regulations, the Commissioner was vested with no discretion, but was obliged to issue the permit. This does not seem logical, when you consider that under section 6 of the

> law it is provided that the action of the Commissioner in refusing the permit may be reviewed before a court of equity, in the manner prescribed in section 5 of the law.
>
> If the Commissioner had no discretion, there would be nothing to review, because, if he was bound to issue the permit on the filing of an application which in form conformed to the regulations, and the bond was given, the duty to issue the permit would be mandatory, and a mandatory order would issue to compel performance of that duty. The fact that the law prescribes that the action of the Commissioner may be reviewed shows that it was contemplated that something should be done by the Commissioner more than merely accepting or refusing an application, based on whether or not it in form conformed to the regulations.

In *Schnitzler* v. *Yellowley* (E. D. N. Y.), 290 Fed. 849, where it was urged that the Commissioner was without discretion to revoke a permit in part, because no discretion could lawfully be vested in him to deny or refuse a permit, the court said (p. 854):

> To say that the law did not contemplate the exercise of any discretion by the Commissioner is to disregard its very language, as we have before quoted the same, and to say that the exercise of discretion therein granted to the Commissioner can not be sustained as a proper exercise of the police power granted to the Congress by the amendment is to render impossible of enforcement the amendment itself.

In the instant case, the Circuit Court of Appeals, with reference to the provision of law under which the court reviews the Commissioner's action, said (3 F. (2d) 936, 937):

> The last phrase, "as the facts and law of the case may warrant," shows that Congress meant the Commissioner was to have, not the mere mandatory clerical duty of signing a permit, but the discretionary and responsible one of considering facts and law before he determined whether he would permit manufacture. If issue of the permit were mandatory on the Commissioner, why give the court jurisdiction to "affirm, modify or reverse the finding of the commissioner as the facts and law of the case may warrant?" That the court was empowered to review the "findings of the commissioner," and was given power to affirm, modify or reverse such findings, shows that what the Commissioner was to do was not the perfunctory signing of a formal permit, but the responsible duty of determining whether this high permissive privilege and permit should be issued to an applicant.

And in *O'Sullivan* v. *Potter* (Mass.), 290 Fed. 844, 847, the court observed:

> Plainly, in a case involving the right of an applicant to receive a permit, it would be open to the Government to show to the court any and all ground of unfitness for such trust.

It is significant that, although the responsibility both for issuing permits originally and for revoking them afterwards, is placed upon the Commissioner of Internal Revenue, the Act sets up safeguards govern-

ing revocations designed to protect the permittee in continuing without interruption a business that may have been established under valuable permit rights, but it is silent as to checks upon the exercise of discretion by the Commissioner in original grants of the permit privilege. Exactly the same language, however, is used concerning the court's review of the "finding" of the Commissioner, whether it be a finding upon which he bases his refusal to grant a permit or the finding upon which he bases his revocation of it.

Title III, governing industrial alcohol, in no way lessens the Commissioner's responsibility for permits, found in Title II. There must be the same filing of application and bond, with full power in the Commissioner to determine the amount and form of the bond and the facts to be sworn to in the application. (Section 10, Title III; see also Section 11, Title III, referring back and incorporating by reference the provisions of Title II concerning the method of applying for, securing, and giving bond for permits.)

Title III has one section, however, which undoubtedly enlarges the obligations of the Commissioner and sets up new guides for his discretion in issuing regulations governing alcohol permits. In unmistakable terms Congress has by Section 13 of that title placed a heavy duty upon the Commissioner of Internal Revenue and has consequently vested him with a very wide discretion in the "*establishment*, bonding, and operation of * * * denaturing plants." Here is to be found a chart or

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series of rules to guide him in making the manifold decisions necessary to regulate the industrial alcohol industry. These rules must consequently be the measure by which the courts test the discretion which the Commissioner has used when refusing applications for permits. Let us examine the standards set up by Section 13.

> (a) The Commissioner shall from time to time issue regulations.

He is given power to lay down rules to govern the nonbeverage alcohol industry and the responsibility of revising, tightening, liberalizing, or changing these rules *from time to time* as his experience, or "the interests of the Government" may dictate. But at all times the regulations (and it is to be assumed the exercise of the Commissioner's administrative judgment whether regulations covered the case or not, would be subject to the same legal restraints and requirements) may go to such limits as—

> (b) may be necessary, advisable, or proper—
>
> 1. To secure the revenue.
>
> 2. To prevent diversion of alcohol to illegal uses.
>
> 3. To place the nonbeverage alcohol industry *upon the highest possible plane* of scientific and commercial efficiency *consistent with the interests of the Government.*
>
> 4. To insure an ample supply of such alcohol and to promote its use in scientific research.

This statute gives broad responsibility to the Commissioner and he needs it to discharge the responsibilities the same statute places upon him.

A permit to operate a denaturing plant and thus to handle thousands of gallons of intoxicating liquor is not a right. It is a privilege. It is one that should be granted with caution by a government bearing the responsibility of prohibiting the transportation and sale of intoxicating liquors for beverage use. The right when once granted becomes an extremely valuable franchise in the hands of a permittee. He builds up a business predicated upon the continued existence of the permit. Quite properly it should not be snatched from him without a chance to be heard and without compelling reasons found. Congress recognized that, and placed safe-guards against arbitrary revocation of permits in Section 9 of Title II of the Act. Even, however, in the case of revocation, the Commissioner is given broad powers to determine facts and to withdraw the privilege.

We submit that it is the fair and reasonable inference from all the provisions of the Act, and particularly from its silence as to any specific limitations on the Commissioner in the procedure of issuing permits to assume that his discretion is much broader in the case of an original grant of the privilege than it is when he attempts to cut off a valuable franchise on which the permittee may have expended time and money. The Commissioner is bound by no such limitations of administrative procedure in withholding the privilege as he is in rescinding it. Only the broad standards of discretion prescribed by Congress, as set out above in the analysis of Section 13 of Title III, govern the Commissioner in deciding

whether to issue a permit. We submit, therefore, that the power of the Commissioner to exercise discretion, notwithstanding that the applicant for a permit may have complied with existing regulations in the form and substance of his application, is a broad one. As was said by District Judge Cliffe:

> Under this law, a permit is a highly permissive personal privilege, and the permittee must be entitled to the confidence of the department that grants the permit. (*Chicago Grain Products Co. Inc.* v. *Blair*, decided April 16, 1926, but as yet unreported.)

II

The denial of a permit by the Commissioner in the exercise of the discretion clearly vested in him by law will not be disturbed upon review by a court of equity unless he has acted arbitrarily or in contravention of the limits of discretion prescribed by the law

The reviewing court of equity does not substitute its judgment for that of the Commissioner and enter into the administrative functions of government. Rather, it tests the exercise of that administrative discretion to determine whether it has been (a) arbitrary or oppressive, or (b) in violation of the prescribed standards of discretion. The only direction found in the law is that—

> The court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant. (Sec. 5, Title II.)

The review of the court, to be the judicial check contemplated by the Act, must take the Commissioner's "finding" and test it "as the facts and law of the case may warrant," according to the rules of law laid down by the Act.

The only *facts* found by the Commissioner to which applicant took exception were, as set out in the answer to the complaint (R. 4):

> That your respondent, as the result of an investigation conducted by respondent's agents is informed that Harry J. Bogash and Joseph H. Klutsch, respectively president and secretary-treasurer of the petitioning company are not individually, or as officers of said petitioner, entitled to be entrusted with a permit of the nature and kind set forth in said bill of complaint, * * *.

To test the Commissioner's finding of fact that Harry Bogash and Joseph Klutsch were not suitable persons to be entrusted with a permit of this kind and nature, the court took evidence. It heard the witnesses, agents of the Government who had investigated the application, the applicants themselves, their friends and relatives, and others. It thus had full opportunity to decide as to the personal interest and credibility of the witnesses and to evaluate their statements, after all of which two trial judges concurred in the decision that the Commissioner had not abused his wide discretion in refusing the application of the applicant for a permit for the establishment of a denaturing plant.

The court was not limited, when reviewing the action of the Commissioner, merely to a determination of whether the applicant had conformed to the regulations. The court could and did decide whether, in refusing the permit upon the alleged unfitness of applicants to be entrusted with the custody of large quantities of intoxicating liquor, the Commissioner had gone outside the limits of discretion laid down by the law. The court properly found that the Commissioner had not done so, that on the contrary there was sufficient evidence to warrant him in refusing these particular men the keys to large quantities of liquor because upon the facts which the Commissioner had and which the court deemed sufficient, the Commissioner believed the officers of this corporation would not "prevent the diversion of alcohol to illegal uses."

Furthermore, the testimony showed that none of the officers of the applicant corporation knew anything about the industrial alcohol business or had ever had any experience with it, nor had they yet selected anybody who was competent to handle the denaturing plant. It is submitted that the latter fact alone was enough to justify the refusal of the permit by the Commissioner, who was charged under Section 13 of Title III of the Act with placing the nonbeverage alcohol industry upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government.

That a court will not set aside the finding of the Commissioner except in a case of clear abuse of his

discretion is well stated by Judge Dawkins in *Shreveport Drug Co.* v. *Jackson* (W. D. La.), 2 F. (2d) 64, 65:

> The apparent purpose of the law was to provide a convenient mode of enforcing prohibition by intrusting it to the Commissioner of Internal Revenue. At the same time, it was thought wise to provide against arbitrary action of that department by granting to the persons whose permits were so revoked a right of review by the courts under their equity jurisdiction. The very language of this provision indicates a desire on the part of the lawmaker to allow the very widest latitude in such investigations, to the end that justice may be done. No more appropriate forum could have been selected for that purpose than the equity side of the courts, with the broad powers which such a proceeding affords. However, I do not believe that it was the intention to impose upon the courts the duty of deciding these questions and administering the law, except where there appears a clear abuse of the powers of the Commissioner or his agents.

See also:

Goldberg v. *Yellowley* (E. D. N. Y.), 290 Fed. 389, 390.

O'Sullivan v. *Potter* (Mass.), 290 Fed. 844, 847.

Millstone v. *Yellowley* (E. D. N. Y.), 290 Fed. 855, 857–858.

Blackman v. *Mellon* (E. D. N. Y.), 5 F. (2d) 987, 988–989.

We maintain that the Commissioner did not abuse his power. There was ample evidence to justify his finding against complainant. The court of equity allowed the widest latitude in producing proof when the Commissioner's findings were under review. A summary of the testimony before the District Court will be found as Appendix D to this brief. A reference thereto shows that, outside of the president of the corporation, the complainant's principal witness was Joseph H. Lieberman, an attorney, the son-in-law of Alperdt, brother-in-law of Bogash, and cousin of Fuerstein. The court saw that the testimony the applicants brought forward to support their claim for a permit was a family affair. The president of the company was caught in inaccurate statements. He displayed a bad memory when naming his business associates who had been in liquor law violations. He was hazy about his co-director's connection with the Glenwood Distillery whose permit had been revoked for law violation. He was a prosperous business man, having recently made so much money that he wanted to invest it in a denaturing plant, and yet he pleaded absolute ignorance of the character of a bond which he had placed and signed as a witness, said bond having been given by a liquor law violator, for a permit which he subsequently violated. He did not know what business his fellow-directors were in, particularly in the instance of one Sidell who was president of the Penn Distilling Company and was then under indictment for prohibition law violations.

On the contrary the agents who made the investigation for the Commissioner named numerous close business associates of the applicants who had been guilty of violation of permits or of the liquor laws on a large scale. Bogash admitted that he had made money in building and loan companies which he wanted to invest in the denaturing plant and the agents disclosed the fact that one of his companies, the Duell, was officered by the above unsavory associates. Two district judges listened to these men testify, weighed their inconsistencies, and had full opportunity for appreciating the lack of frankness on the part of the applicants for this permit.

After complete review by the District Court of the facts that led the Commissioner to distrust the reliability of the officers of the Ma-King Company, the Commissioner's finding in that regard was upheld by the District Court, both judges concurring. The Circuit Court of Appeals reviewed the testimony and concluded that the business associations of the applicants had been with men whose conduct had "invited prohibition prosecutions against them" and that "the Commissioner would have been derelict in duty in granting them a permit."

It is submitted that applicants having had a review in a court of equity and court of appeals, this Court, in the absence of plain error, will not set aside the concurrent findings of both courts below. No such error appears in this record.

CONCLUSION

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully,

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

JOHN J. BYRNE, *Attorney.*

MAY, 1926.